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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1294~~ 108

SAMUEL MONASTERSKY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	4
Reasons for Granting the Writ	9
Conclusion	10
Appendix A—Opinion of United States Court of Appeals	A1
Appendix B—Judgment of United States Court of Appeals	A12

Authorities Cited

Cases

United States v. Bentvena, 319 F. 2d 916 (2nd Cir., 1963)	4
United States v. Landry, 257 F. 2d 425 (7th Cir. 1958)	10

Statutes

21 U.S.C. § 173	2, 4, 8
21 U.S.C. § 174	2, 3, 4, 8, *passim*
28 U.S.C. § 1254(1)	2

Supreme Court of the United States

October Term, 1965

SAMUEL MONASTERSKY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Monastersky prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on February 23, 1966.*

Citations to Opinions Below

The opinion of the Circuit Court of Appeals is not yet reported and is printed as Appendix A and Judgment as Appendix B to this petition.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on February 23, 1966. No motion for reargument was made. Mr. Justice Harlan extended petitioner's time in

* Co-appellants Bentvena and Struzzieri in the Court of Appeals below are, we believe, also perfecting petitions for writs of certiorari. However, as they moved for reargument, their petitions will be filed at a later date.

which to file a petition for a writ of certiorari to April 23, 1966. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

Questions Presented

1. Whether active participation in a narcotics transaction constitutes possession of narcotics sufficient to invoke the presumption contained in § 174 of Title 21 U.S.C.

2. Whether an incidental and momentary touching of narcotics contraband, physically possessed by others, which is incidental to active participation in a narcotics transaction, is sufficient to invoke the presumption contained in § 174 of Title 21 U.S.C.

Statutes Involved

TITLE 21, SECTION 173, UNITED STATES CODE

§ 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

> "It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes."

TITLE 21, SECTION 174, UNITED STATES CODE

§ 174. Same; penalty; evidence.

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be

imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Statement

The petitioner Monastersky was convicted along with one Bentvena and one Struzzieri, of two counts of substantive violations of the United States Code, Title 21, §§ 173, 174. One count charged a narcotics transaction on January 6, 1959, and named Struzzieri as a co-defendant, and the second count charged a narcotics transaction on January 13, 1959, and named both Bentvena and Struzzieri as co-defendants. The present trial was a retrial after reversal, *United States* v. *Bentvena*, 319 F. 2d 916 (2nd Cir., 1963), based on an improper joinder into a so-called "mass conspiracy". The shape of the government's proof as to Monastersky was this:

Federal Narcotics Agent STEPHEN GIORGIO testified that on the evening of January 5, 1959, he went with a special employee of the Bureau of Narcotics to 210 East 116th Street where he was introduced to MONASTERSKY. They discussed the purchase of narcotics and the agent was told that the price was $6,000 for half a kilogram which would be pure and would come from an "Irish connection" of MONASTERSKY's On the following day he called MONASTERSKY at a number which he had been given and ordered

half a kilo and was told by MONASTERSKY to meet him at 10:15 that evening at the same place, which he did. MONASTERSKY then arranged to meet him at 87th Street and York Avenue and from there they entered 448 East 87th Street and went to Apartment 3-B which was listed in the name of Phillips. (3-12)* He was there introduced to RICHARD MCGOVERN, who produced a package from which the agent tested a sample. MCGOVERN asked for the $6,000 and the agent insisted that the three of them go to his vehicle. At the vehicle the agent handed $6,000 to MCGOVERN, who handed him the package. (12-17) He thereafter marked the package for identification and gave it to Agent MANGIARACINA, who was in the vehicle. (18-24)

On January 13th he called MONASTERSKY and told him that he was satisfied with the merchandise but not the price. MONASTERSKY asked if he was ready to negotiate further and when he said yes MONASTERSKY told him to meet him at York Avenue and 87th Street that evening, which he did. When they met, MONASTERSKY told him that "RICH" was unable to use the apartment at 448 East 87th Street, but had rented another apartment at 525 East 88th Street. They went to that address to Apartment 2-H, which was listed under the names of CONNORS and MCGOVERN. (24-26) The agent overheard MONASTERSKY say "Okay, Rich, we'll be back at 9:30", and MONASTERSKY told GIORGIO to meet him there again at 9:30. At about 9:25, while he was waiting in front of the building, he observed BENTVENA and STRUZZIERI enter the building and shortly thereafter MONASTERSKY emerged and said "Let's take a walk". MONASTERSKY suggested that he bring the

* Numbers in parentheses refer to pages of the typewritten transcript of the trial unless otherwise indicated.

money up to the apartment and GIORGIO countered with the suggestion that he bring his partner, who had the money, to the vestibule. He signalled to Agent MANGIARACINA who joined them in the vestibule, but waited while GIORGIO and MONASTERSKY went up to the apartment from which BENTVENA and STRUZZIERI were emerging. (26-29) After they were in the apartment a few minutes the doorbell sounded and McGOVERN went to the door. A few minutes later he came back to the center of the room where GIORGIO and MONASTERSKY were seated and took a package from under his robe and put it on the table. (42) The package was a brown paper bag containing a plastic bag and GIORGIO tested the contents and talked with McGOVERN about the price for three kilos. (43-45) McGOVERN asked him if he had the money and he said no and went outside the door to Agent MANGIARACINA who came up and handed him a white envelope which he gave to MONASTERSKY who then handed him the package. (45-47)

On cross examination, Agent GIORGIO conceded that he had testified at a previous trial that on the second occasion McGOVERN, rather than MONASTERSKY, had given him the brown paper bag which he told them he wanted to watch to avoid any possible switch. (60-61)

Agent ANTHONY MANGIARACINA testified that on January 6, 1959, he drove Agent GIORGIO to 116th Street and 3rd Avenue and thereafter drove him to York Avenue and 87th Street where he saw GIORGIO and MONASTERSKY meet and enter 448 East 87th Street and about 15 or 20 minutes thereafter emerge from the building with RICHARD McGOVERN and come over to the car. Agent GIORGIO, MONASTERSKY and McGOVERN went to the back of the car and GIORGIO handed McGOVERN a white envelope and took

a package from McGovern. The envelope contained $6,000. (85-93)

On January 13th he drove Giorgio to York Avenue and 87th Street where Giorgio joined Monastersky and walked with him out of sight. Giorgio returned to the car and at about 9:30 they parked near 525 East 88th Street and Giorgio went to the front of the building. After a period of time Giorgio signalled to him and he went over and was introduced to Monastersky. They all went inside and he remained downstairs while Giorgio and Monastersky went upstairs. Struzzieri and Bentvena came down the stairs and left the building; about 10 minutes later they re-entered the building and went back upstairs and then very shortly thereafter came back downstairs and left. About 15 or 20 minutes after Bentvena and Struzzieri left, Giorgio called from the landing and Agent Mangiaracina went up toward the landing where Giorgio and Monastersky were standing. (100-107) Giorgio asked for and took the envelope containing $6,000 and passed it to Monastersky. (107-109)

On cross examination Agent Mangiaracina was taxed with his testimony in the 1960 trial that he could not see to whom the envelope was passed (118) and his testimony in the 1962 trial in which he testified that Agent Giorgio "did something" with the envelope (121) and conceded that the present trial was the first time that he had indicated to anyone while under oath that it was Monastersky who had received the envelope from Giorgio on the 13th. (121) He conceded that he had never seen Monastersky hand anybody a package. (123)

The testimony of the remaining agents, Leonard Schrier, Charles Ward, Ivan Wurms, Benjamin Fitzgerald and

Narcotics Bureau Clerk MORGAN, was essentially corroboration by their surveillance of the movements of MONASTERSKY from place to place and was primarily directed to the activities of BENTVENA and STRUZZIERI, except that Agent SCHRIER did overhear a conversation between STRUZZIERI and one ORLANDINO in which ORLANDINO said "I hope this guy trusts Sammy with the money the next time," (176) apparently referring to MONASTERSKY. The government chemist testified as to his analysis of the package as heroin.

In the Court of Appeals, Monastersky contended that failing a showing of possession, the government had failed to prove importation and knowledge thereof and could not rely on the presumption contained in §§ 173, 174 of Title 21 to fill out that gap in its proof. The Court of Appeals rejected this contention, relying upon so-called "constructive possession," and said:

> " . . . We disagree with appellant. We believe the evidence in this case established that Monastersky had, on both occasions, power to control the disposition of the heroin sufficient to constitute 'possession' within 21 U.S.C. § 174."

Thus "power to control the disposition" was substituted for the statutory "possession" as a base for invoking the presumption of § 174. Congress did not make the presumption of § 174 applicable to one who controls narcotics or deals in narcotics, but only to those who possess narcotics. Of course possession may be shown by a continuous and undefined control of an agent who holds the narcotics, as where narcotics are carried by a porter in luggage in a railroad station, but here the buying agent haggled on one occasion with McGovern, not Monastersky (44), and when

Monastersky and the agent arrived at the time Monastersky designated they were sent out to stroll the streets for an hour to suit McGovern's convenience in connection with the production of the narcotics. We do not urge that Monastersky's conduct was free of the aura of criminality, but simply that it did not involve that specific kind of conduct, i.e., possession, which Congress saw fit to require as a precondition for invoking the presumption of importation and knowledge of importation.

REASONS FOR GRANTING THE WRIT

Though the narcotics law constitutes an important part of the federal criminal law, this Court has never spoken on what sort of possession and control other than direct physical possession and control is required in order that the government may avail itself of the presumption contained in § 174 of Title 21. It is quite apparent from the instant case that despite the Draconian nature of the narcotics statutes, the courts, and certainly the Second Circuit, have come to substitute the test of participation in a narcotics transaction for possession of narcotics in invoking the presumption so necessary to the government's proof; there was no evidentiary showing of importation.

Even taking, as we must at this juncture, the government's proof in its strongest posture, the petitioner's role here was that of an arranger, an introducer, a broker. He no more had possession of the narcotics than a real estate broker who brings together a purchaser and a seller and who may actively participate in a negotiation has possession of the real estate. Though there was some testimony of a fleeting touching of the contraband substance by the

petitioner, neither the District Court nor the Court of Appeals relied upon that to invoke the presumption, but rather at most treated it as a circumstance showing constructive possession, and in so doing have extended the scope of a broad and sweeping presumption attached to one of the most stringent provisions of the federal criminal law.

While there may not be a direct conflict between the various circuits in terms of irreconcilable holdings, it is perfectly clear that the same set of circumstances is likely to produce different results. Compare: *United States* v. *Landry*, 257 F. 2d 425 (7th Cir. 1958), where the Seventh Circuit held no possession on the part of an admitted addict where drugs owned by him were held by another for his use.

We respectfully submit that by giving this Court an opportunity to speak definitively for the first time on the meaning of possession in § 174 and to make harmonious the rule in the various circuits, the granting of the writ here is in the interest of the sound administration of justice in the federal courts.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT KASANOF
Attorney for Petitioner Monastersky

April 1966

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 63—September Term, 1965.

(Argued October 20, 1965 Decided February 23, 1966.)

Docket No. 29732

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

WILLIAM BENTVENA, WILLIAM STRUZZIERI and SAMUEL MONASTERSKY,

Defendants-Appellants.

Before:

WATERMAN, MOORE and FRIENDLY,

Circuit Judges.

Each defendant was convicted of selling narcotics in violation of 21 U. S. C. §§ 173-74. The United States District Court for the Southern District of New York, McGohey, *J.*, rendered a judgment of guilty after a jury trial, and the defendants appealed. Affirmed.

HOWARD L. JACOBS, Asst. United States Attorney, Robert M. Morgenthau, United States Attorney, Neal J. Hurwitz, Asst. United States Attorney, *for Appellee.*

Appendix A—Opinion of United States Court of Appeals

JEROME LEWIS, Brooklyn, N. Y., *for Appellants Bentvena and Struzzieri.*

ROBERT KASANOF, New York City, *for Appellant Monastersky.*

WATERMAN, *Circuit Judge:*

By this opinion we affirm the convictions of three co-defendants, who, having been charged with violations of 21 U. S. C. §§ 173, 174 on January 6 and January 13, 1959, were each severally found by a jury to be guilty as charged. Samuel Monastersky and William Struzzieri were convicted of unlawful involvement on both occasions, William Bentvena as to the January 13 violation only.[1]

On this appeal, appellants Bentvena and Struzzieri argue that the judgments against them should be reversed and the pertinent counts of the indictment dismissed as to them,[2] because the Government's proof tending to show their guilt was so meager that the trial court erred in failing to direct

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1 The indictment out of which these convictions arise was filed on May 5, 1960. It named twenty-nine defendants and contained eight counts. The first trial on the indictment ended in a mistrial after six months. The second trial resulted in the conviction of thirteen defendants, including the present appellants, on counts four and five charging substantive violations of the narcotics laws and on count eight, the general conspiracy count. On June 13, 1963 our court affirmed the convictions of nine of the defendants but reversed the convictions of appellants and the defendant Salvatore Panico and remanded for a new trial. *United States* v. *Bentvena*, 319 F. 2d 916 (2 Cir.), *cert. denied*, 375 U. S. 940 (1963). This appeal follows the third trial.

2 Appellants Bentvena and Struzzieri seek only a reversal with directions that the indictment be dismissed, they do not seek a new trial.

verdicts in their favor at the close of the Government's case. Appellant Monastersky states his willingness to adopt his codefendants' argument as his own should it commend itself to this court, but he mainly relies upon the argument that the Government should not have been allowed to avail itself of the evidentiary rule contained in 21 U. S. C. §174[3] because it failed to prove he had possession of the heroin that was the subject matter of the transactions of January 6 and January 13. He concludes that without the benefit of this rule his conviction cannot stand. We take up these separate contentions in order.

I.

The initial issue is whether the evidence presented by the Government during its case-in-chief was sufficient to permit the cases against any or all of these defendants to be submitted to the jury. We look first to the evidence relating to the January 6 transaction in which only Monastersky and Struzzieri were allegedly involved. The case against these two codefendants, based almost entirely on the trial testimony of several federal narcotics agents, can be briefly summarized. On January 5, Agent Giorgio had arranged with Monastersky to purchase from him on

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3 It is a federal offense under Section 174 to import narcotics illegally or to deal in such drugs with knowledge that they have been illegally imported. The statute goes on to provide: "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." In the present case Monastersky argues the Government did not prove he had or had had possession of the heroin which was the subject of the illegal transactions.

the following day one-half kilogram of heroin for $6,000. At about 8:40 P.M. on January 6 several agents observed Monastersky enter 525 East 88th Street. Several minutes later a car arrived on the scene and parked. Struzzieri got out and entered the same building Monastersky had previously entered. A second federal agent, Agent Ward, testified that when Struzzieri left the car and entered the building he was carrying a package wrapped in blue paper on which appeared a white snow man design. Shortly thereafter Struzzieri left the building empty handed and drove off in the same car in which he had arrived. At about 9:30 P.M. one Richard McGovern left 525 East 88th Street carrying a package and proceeded to 448 East 87th Street. A short time later Monastersky brought Agent Giorgio to 448 East 87th Street. There they met McGovern in an apartment in this building, McGovern produced a package wrapped, according to Giorgio, in blue paper on which appeared a white snow man design and the package, when opened, contained a white powder later proved to be heroin. The three men then left the apartment; once outside Giorgio handed McGovern $6,000 and McGovern gave the agent the package, which contained about one-half a kilogram of heroin. Giorgio took the package to an automobile where a third agent, Agent Mangiaracina, was waiting. There was also testimony tending to show that Struzzieri met McGovern for a few minutes later in the evening.

Assuming for the moment that the trial court correctly charged the jury that it could find Monastersky had "possession" of the heroin sold on January 6 sufficient to justify reliance on the rule contained in 21 U. S. C. §174 it is quite

clear that the Government's case against Monastersky relative to this January 6 sale was sufficient to go to the jury. Indeed, the evidence tending to prove that Monastersky was actively involved in this unlawful sale was largely uncontradicted. We surely cannot disturb a jury verdict based on such evidence. See *United States* v. *Dardi*, 330 F. 2d 316 (2 Cir.), *cert. denied*, 379 U. S. 845 (1964).

Whether the Government's case concerning the January 6 sale of heroin made out a case against Struzzieri sufficient to go to the jury is a closer question. Essentially, the Government's case against Struzzieri consists of Giorgio's testimony that he received the heroin from McGovern and Monastersky in a package wrapped in blue paper on which appeared a white snow man design, and the testimony of Ward that he observed Struzzieri carrying just such a package enter 525 East 88th Street shortly after Monastersky had entered the building and only a few hours before a package so wrapped was passed to Giorgio. The Government contends this evidence was sufficient to allow a reasonable jury to find that Struzzieri brought to McGovern and Monastersky the heroin that the latter pair then sold to Giorgio. Struzzieri argues that the issue of his guilt should not have been submitted to the jury because crucial testimony of several narcotics agents was "meager," "remote," and "incredible."

In support of his argument Struzzieri first points to the fact Agent Mangianacina, who waited in an automobile for Giorgio to return with the heroin on the evening of January 6, testified the package Giorgio brought with him to the automobile was brown in color. Unquestionably, this testi-

mony as to the color of the package varied from Giorgio's testimony that the package was blue and white. Nevertheless, the jury could well have determined that Mangiaracina was mistaken in his recollection of the color and that Giorgio's testimony was to be believed. Such a resolution of the variance, which would tend to incriminate Struzzieri, would be supported by the testimony of Agent Ward who stated that the package Struzzieri carried when he entered 525 East 88th Street was wrapped in blue paper on which appeared a white snow man design. We cannot say that such a resolution of this evidential variance would be unreasonable; therefore we should not replace it with our own. This is not a case in which two segments of the Government's proof was absolutely essential to support a conviction and each contradicts the other. *United States* v. *Moret*, 334 F. 2d 887, 893 (2 Cir. 1964) (Waterman, *J.*, dissenting), *cert. denied*, 379 U. S. 993 (1965). Rather, here there was a conflict in the Government's proof, tending to establish only one fact among many facts that together tended to prove Struzzieri was carrying the package that contained the heroin subsequently sold to Giorgio. Undeniably the variance as to the color of the wrapping paper weakened the Government's case against Struzzieri. Nevertheless, the jury concluded the package that Giorgio received from Monastersky and McGovern was the package Struzzieri brought to the latter pair earlier in the evening. We should not disturb this permissible resolution of the variance since this is precisely the sort of task that juries are best able to perform. *United States* v. *Dardi*, *supra*; *United States* v. *Tutino*, 269 F. 2d 488 (2 Cir. 1959).

Struzzieri also contends the Government's case tending to involve him in this January 6 transaction was fatally weak because Agent Ward's testimony that he observed Struzzieri enter 525 East 88th Street carrying a package wrapped in blue paper on which appeared a white snow man design was incredible and unworthy of belief because of the distance separating Ward from Struzzieri and the poor lighting conditions at that time. In other words, Struzzieri's claim is not that the Government failed to present evidence from which reasonable men could be convinced of a certain fact beyond a reasonable doubt; rather he claims that the physical facts so contradict Ward's testimony as to render that testimony unbelievable. We disagree. Deciding whether certain evidence should be believed is precisely the task set the jury in a prosecution such as this; we should not interfere with the jury's decision in this case that Ward's testimony was credible.

We next turn to consider whether the Government's evidence relating to the January 13 transaction in which all of the defendants were allegedly involved was sufficient to permit the cases against any or all of them to be submitted to the jury. Again, the case against Monastersky, Struzzieri and Bentvena was based almost entirely on the trial testimony of several narcotics agents, and it, too, can be briefly summarized. Agent Giorgio made arrangements with Monastersky to purchase another half kilogram of heroin on January 13 from Monastersky and McGovern for $6,000. On that date, at about 9:25 P.M. Bentvena and Struzzieri arrived in a car on East 88th Street; they parked and entered the apartment building numbered 525. Shortly

thereafter Monastersky came out of this building and met Agent Giorgio who had been waiting in the immediate vicinity for some time. Giorgio introduced Agent Mangiaracina to Monastersky as his partner and while Mangiaracina waited in the lobby of the building Monastersky and Giorgio made their way to apartment 2-H, which was McGovern's apartment. While doing so they met Struzzieri and Bentvena coming toward them in the opposite direction. When Bentvena and Struzzieri arrived in the lobby Mangiaracina observed Bentvena stop and speak into the intercom system; at approximately the same time Giorgio observed McGovern go to the intercom connection in apartment 2-H and speak into it, saying, "Everything is okay." Mangiaracina then saw Struzzieri leave the building, while agents outside saw them walk to their car, remove a brown package from the trunk, and together return to the lobby where Mangiaracina saw them go upstairs again. Shortly thereafter, according to Giorgio, the doorbell rang in apartment 2-H, McGovern answered the bell and returned with a brown package ultimately found to contain heroin. Bentvena and Struzzieri were observed leaving the building a few minutes after their last entry. In the meantime, McGovern had asked Giorgio for the money. Giorgio summoned Mangiaracina, his supposed partner, from the lobby, the agents handed an envelope containing $6,000 to Monastersky, and Monastersky handed the package of heroin to Giorgio. Subsequently Struzzieri and Bentvena returned to 525 East 88th Street, where they remained for about an hour.

Considerations similar to those that caused us to affirm the jury's verdict of guilty based on the evidence relating

to the January 6 sale cause us to hold that the evidence introduced by the Government relating to the January 13 sale was sufficient to support the jury's verdict of guilty as to the latter transaction. Viewing the evidence, as we must, in the light most favorable to the Government, *United States* v. *Tutino, supra,* and recognizing that involvement in an illegal sale of narcotics may be proved by circumstantial evidence, *United States* v. *Moret, supra,* we cannot say that reasonable jurors could not have found beyond a reasonable doubt that Struzzieri and Bentvena delivered the heroin to Monastersky and McGovern which they, in turn, sold and delivered to Giorgio. And, of course, Monastersky's involvement in the transaction is firmly established.

II.

We now examine the claim of appellant Monastersky that his conviction on both counts should be reversed because, as the record does not show that the heroin sold to the agents was illegally imported, or that Monastersky knew from where it came, his conviction can only stand if the Government proved he had "possession" of the drugs,[4] which he maintains, the Government failed to do. Monastersky contends the Government's proof establishes only that he was a "casual facilitator" of the sales in question, in other words that he merely introduced a willing seller to a willing buyer, activity that we held was insufficient to establish possession, either actual or constructive, in *United States* v. *Jones,* 308 F. 2d 26 (2 Cir. 1962). We disagree with appellant. We believe the evidence in this case estab-

4 See note 3, *supra.*

lished that Monastersky had, on both occasions, power to control the disposition of the heroin sufficient to constitute "possession" within 21 U. S. C. §174. See *United States* v. *Jones, supra.* In *Jones* we reversed a conviction under §174 that equated mere participation in a sale of narcotics with "possession" of the narcotic drug. In discussing the facts of that case we said:

> We believe the evidence in this case negates a conclusion that defendant Jones had dominion and control over the narcotics handed to Brown by Moore. The pains Jones took in the first instance to find Moore indicate that Jones was unable to consummate the transaction as a business dealing of his. The price and place of delivery were not even discussed with the would-be purchaser until defendant spoke with Moore. No one can say that Jones established these essential details of the affair unless he engages in speculation wholly unwarranted by the trial record. After consummation of the transaction Moore told agent Brown to purchase directly from him in the future and not to deal with anyone else. This statement by Moore negates a finding that Jones could assure, as a matter of course, delivery by Brown to a customer Jones might discover. [308 F. 2d at 31.]

The facts here are quite different. On both January 6 and January 13 Monastersky apparently set the price of the heroin without consulting with McGovern. On January 6 Monastersky was in the building when Struzzieri delivered the heroin. At both sales to Giorgio, Monastersky remained with McGovern throughout. And during the January 13 transaction Monastersky had the heroin package in his

hands, Giorgio paid the money directly to Monastersky, and Monastersky handed the heroin directly to Giorgio. This evidence brings Monastersky's case well within our statement in *Jones* that "evidence showing that a given defendant set the price for a batch of narcotics, had the final say as to means of transfer, or was able to assure delivery, may well be sufficient to charge the defendant with a constructive possession of the narcotics . . ." 308 F. 2d at 31.

Monastersky also contends that the trial court's charge relating to constructive possession was improper. We would be hard pressed to detect error in this charge. In any event, since Monastersky failed to object to the charge at trial, or to request a different charge, he may not, barring special circumstances not present here, raise the issue on appeal. See *United States* v. *Indiviglio,* 352 F. 2d 276 (2 Cir. 1965), *cert. denied,* Feb. 21, 1966, —— U. S. ——.

Affirmed.

APPENDIX B

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of February one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DALE KAISER, et al.,

Defendants,

WILLIAM BENTVENA and WILLIAM STRUZZIERI,
SAMUEL MONASTERSKY,

Defendant-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment of United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they are hereby affirmed.

A. DANIEL FUSARO
Clerk

Office-Supreme Court, U.S.
FILED
MAY 12 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. ~~1303~~ 129

WILLIAM BENTVENA and
WILLIAM STRUZZIERI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provision and Statute Involved	2
Statement of the Case	4
1. Introductory	4
2. The Indictment; the Prior Two Trials	5
3. The Limitation of the Issues Pursuant to the Order of Reversal in the Appeal from the Second Trial	6
4. The Government's Theory of the Proofs in this Third Trial	6
5. The Trial Proofs as to the Alleged Transaction of January 6, 1959 (Struzzieri, Fourth Count)	7
6. The Trial Proofs as to the Alleged Transaction of January 13, 1959 (Bentvena and Struzzieri, Fifth Count)	9
7. The Defense Motions	11
8. The Decision of the Court of Appeals; the Petition for Rehearing in the Court of Appeals	11
Reasons for Granting the Writ	11
Conclusion	20
Appendix	21

TABLE OF CASES

United States v. Bentvena, 319 F. 2d 916, 921 (C.A. 2 1963) 5, 6

Ormento et al. v. United States, 375 U. S. 940 5

Farrar v. United States, 275 F. 2d 868 (C.A. D.C. 1960) 16

United States v. Castro, 228 F. 2d 807 (C.A. 2 1956) 16

United States v. Litberg, 175 F. 2d 20, 21 (C.A. 7 1949) 16

Cartwright v. United States, 335 F. 2d 919 (C.A. 10 1964) 16

United States v. Conti, 339 F. 2d 10, 13 (C.A. 6 1964) 16

STATUTES

United States Constitution, Fifth Amendment 2

21 U.S.C. § 173 ..... 2, 4

21 U.S.C. § 174 ..... 2, 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. .....

WILLIAM BENTVENA and WILLIAM STRUZZIERI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, William Bentvena and William Struzzieri, pray that a writ of certiorari issue to review the judgment of affirmance by the United States Court of Appeals for the Second Circuit entered February 23, 1966 and further described *infra.*

Opinions Below

The opinion of the Court of Appeals, printed in the Appendix hereto, *infra,* is not yet reported. The District Court did not render an opinion.

Jurisdiction

The judgment of the Court of Appeals was entered February 23, 1966.* A timely petition for rehearing on

* The judgment is not available to us for printing in the Appendix hereto because it was filed in this Court some time ago by another petitioner, Samuel Mondstersky.

behalf of both petitioners was denied March 14, 1966. Mr. Justice Harlan has granted an extension of time to and including May 13, 1966 within which to petition for certiorari in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioners were convicted of narcotic violations and sentenced to imprisonment. The questions are:

1. Should the judgments of conviction be reversed and the indictment dismissed because the meagerness, remoteness and incredibility of the Government's proofs require acquittal as a matter of law?

2. Should there have been applied in this case the standard that a criminal case ought to be determined by the Trial Judge to be improper for submission to the jury when, in the Trial Judge's own judicial opinion as a matter of law the proof is such that reasonable men could not differ in believing that a reasonable doubt exists?

Constitutional Provision and Statute Involved

The case involves the due process clause of the Fifth Amendment, and 21 U.S.C. §§ 173, 174. The latter statutes read as follows:

> **"§ 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures**
>
> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Nar-

cotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. Feb. 9, 1909, c. 100, § 2(b), (d), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, § 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; June 14, 1930, c. 488, § 3, 46 Stat. 586."

"§ 174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any

territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, § 2(c), (f), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, § 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; Nov. 2, 1951, c. 666, §§ 1, 5(1), 65 Stat. 767; July 18, 1956, c. 629, Title I, § 105, 70 Stat. 570."

Statement of the Case

1. Introductory

Petitioners were convicted in the United States District Court for the Southern District of New York, after a jury trial, of narcotics violation under 21 U.S.C. §§ 173, 174 (33a,

35a*). Struzzieri was convicted on two substantive counts (33a), Bentvena on one substantive count (35a). Each of the defendants was sentenced to six years, Struzzieri's sentence to run concurrently on his two conviction counts (33a, 35a).

The United States Court of Appeals for the Second Circuit affirmed the convictions. Certiorari is sought herein to review said affirmance of the convictions.

2. The Indictment; the Prior Two Trials

The indictment was originally filed May 5, 1960, containing eight counts (including one conspiracy count) and naming 29 defendants (*United States* v. *Bentvena,* 319 F. 2d 916, 921 (C.A. 2 1963)), cert. den. *sub nom. Ormento et al.* v. *United States,* 375 U. S. 940. The first trial of the indictment, before District Judge Levet and a jury, ended in a mistrial after a trial of six months (*ibid.*). In the second trial, before District Judge MacMahon and a jury, the within appellants Bentvena and Struzzieri were convicted, but their convictions were reversed by the Court of Appeals (*ibid.*); the order of reversal remanded the case as to Bentvena and Struzzieri for a new trial on the substantive counts only (*ibid.*). The instant third trial was had against Bentvena, Struzzieri and a third defendant, Monastersky. Struzzieri was tried on the Fourth Count, which charged him and Monastersky** with a sale etc. of heroin on Janu-

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* " a" refers to the printed "Appellants' Appendix" (blue cover, 40 pages) in the Court below, nine extra copies of which were filed in this Court when the record was docketed on behalf of another certiorari petitioner, Samuel Monastersky, who was a co-defendant in this trial. The printed Appendix does not include any testimony. The testimony is cited to the typewritten stenographic minutes of the trial by page number (cited as "Tr. "). The stenographic minutes are being filed in this Court by the within petitioners Bentvena and Struzzieri.

** The Fourth Count had originally named also Marcantonio Orlandino as a defendant, but the latter's name was stricken from the Fourth Count at the outset of this trial.

ary 6, 1959 (6a), and upon the Fifth Count which charged him Bentvena and Monastersky with a sale etc. of heroin on January 13, 1959. Bentvena was charged and tried herein only under the Fifth Count (7a).

3. The Limitation of the Issues Pursuant to the Order of Reversal in the Appeal from the Second Trial

The conviction of Bentvena and Struzzieri in the second trial (before Judge MacMahon) was found by the Court of Appeals to have been unjustified on the conspiracy count inasmuch as there was insufficient independent proof of their participation in the conspiracy, and unjustified on the substantive counts owing to the prejudicial effects of the hearsay received under the conspiracy count (*United States* v. *Bentvena,* 319 F. 2d 916, cited *supra*).

4. The Government's Theory of the Proofs in this Third Trial

The Government contended that on two occasions in January 1959 Monastersky and one Richard McGovern (since deceased) sold one-half kilo quantities of heroin to a narcotics agent, Georgio, that Struzzieri was involved in delivering the heroin in the first transaction (January 6, 1959) to the sellers, and that Bentvena and Struzzieri were involved in the delivery to the sellers in the second transaction (January 13, 1959).

While the Government of course refrained from endeavoring to inject into this third trial any of the former conspiracy proofs under the original indictment which were closed off by the Court of Appeals in the appeal from the convictions in the second trial, we maintain that the Government improperly used much proof concerning alleged activities of Monastersky and McGovern which took place out of the presence of Bentvena and Struzzieri; that it also improperly used proof concerning Struzzieri which

related to matters outside of the presence of Bentvena; and, above all, that the Government's proofs concerning both Bentvena and Struzzieri in this third trial were not only too meager and remote for submission to the Jury, but were so ridden with incredibility and inconsistency as to present an issue of law concerning their rational sufficiency under the standards of proof of a *prima facie* case and proof beyond a reasonable doubt.

5. The Trial Proofs as to the Alleged Transaction of January 6, 1959 (Struzzieri, Fourth Count)

Narcotics agent Georgio described in detail his dealings with Monastersky and McGovern which led to the alleged sale of January 6, 1959 (Tr. 3-23). Georgio said that the small package containing one-half kilo of heroin was wrapped in an outer wrapping of a Christmas type of paper, blue in color with pictures of a snowman imprinted on it (Tr. 14, 20-21). He said that he took this package to an automobile where Agent Mangiaracina was waiting (Tr. 63-65, 157-159). Since the Government also introduced testimony (*infra*) of another agent that Struzzieri had been seen carrying a package of the same description to the apartment where Georgio allegedly got the package from McGovern and Monastersky, the question of the correct description of the package was a prime factual issue at the trial.

Agent Mangiaracina testified in the most positive and unequivocal way that the package which Georgio said was wrapped in blue Christmas paper was actually a brown package (Tr. 97-98, 134-140, 142, 144). It was evident from the cross examination of Mangiaracina that he felt himself to be under a strong official inclination or pressure to corroborate Georgio's description of the package, but Mangiaracina's testimony adhered to the description of the package as brown (Tr. 134-140).

Narcotics Agent Schrier testified that on the night of January 6 he had seen Struzzieri as a passenger in an automobile driven by Orlandino in the immediate vicinity of the apartment where Georgio allegedly got heroin from McGovern and Monastersky (Tr. 164, 166-167); and that after Georgio had paid over the money he (Schrier) saw Struzzieri get out of the automobile, meet and talk briefly with McGovern on the street, enter the building with McGovern and shortly thereafter drive off in the car with Orlandino, Schrier following them to a diner in Nassau County where he heard Orlandino say to Struzzieri, "I hope this guy trusts Sammy with the money the next time" (Tr. 171-177).*

Narcotics Agent Morgan testified that on the night of January 6 he had overheard a conversation between Orlandino and Struzzieri in a luncheonette in Manhattan in which Struzzieri said "I don't like this guy", Orlandino asked him "What guy?" Struzzieri said "This guy tonight. He should have paid the money like a man", Orlandino said "Yes, he should pay on demand" and then Orlandino added "You know, you have to be careful. A guy could be your best friend and he could turn you" (Tr. 246-247).

Narcotics Agent Ward testified that on the night of January 6 (as described by Agent Schrier) an Oldsmobile had been seen in the block where Georgio allegedly got the heroin from Monastersky and McGovern, that Struzzieri got out of the Oldsmobile carrying a blue and white Christmas type package and he entered the building and pushed a bell, that after this Struzzieri left the building carrying nothing and got back in the car with Orlandino, the car driving to Nassau County (Tr. 260-267). In a lengthy cross examination of Ward it developed that his opportuni-

* According to the Government's theory "Sammy" meant Monastersky, and the reference about trusting "Sammy" had to do with Georgio's having insisted upon certain security precautions before turning over the money on that night.

ties for reliable vision of the package at the distances and under the lighting conditions involved were extremely questionable, to say the least, especially as regards Ward's claim that he could see a "snowman" design on the blue Christmas wrapping (Tr. 274-304, 311-313).

The Government's chemist-witness, Milos, testified to nothing concerning the alleged Christmas wrapping; he received the heroin for testing in a glassine bag (Tr. 427-433).

The defense introduced testimony by a surveyor and a photographer concerning the street layout and street distance measurements of the scene where the Government's agents are supposed to have observed with such precise detail the alleged happenings during the nighttime and at distances which would appear to preclude the claimed observations as a matter of the sheer possibilities of human physiological optics (Tr. 448-449, 450-457).

6. The Trial Proofs as to the Alleged Transaction of January 13, 1959 (Bentvena and Struzzieri, Fifth Count)

Agent Georgio testified that in connection with his alleged second purchase of heroin from Monastersky and McGovern, on January 13, 1959, McGovern now having moved to a different address, Georgio noticed the names "Connors" and McGovern on the doorbell for the apartment, when he came upstairs the sellers were not ready for him, Georgio returned a little later at which time he saw Bentvena and Struzzieri entering the building, Monastersky arrived in front of the building and asked Georgio to take a walk with him to discuss the finances, then when Monastersky and Georgio re-entered the apartment house Georgio saw Bentvena and Struzzieri coming down into the lobby, Georgio and Monastersky then went up to the apartment, Georgio heard the intercom buzzer, and thereafter the transaction was concluded, the heroin this time being in a brown paper package (Tr. 23-51).

Mangiaracina testified that while Georgio was upstairs in the apartment he saw Bentvena and Struzzieri coming down the stairs, they walked into the front foyer, and Bentvena pushed a buzzer and said "Connors"; five or ten minutes later Bentvena and Struzzieri returned to the building, pushed a buzzer, went upstairs, and came down again after a very short time (Tr. 103-106).

Schrier testified to seeing Bentvena and Struzzieri coming out of the apartment building, go to a nearby bar where Bentvena made a phone call, and then they drove off in a 1952 Chevrolet (Tr. 179-180).

Narcotics Agent Wurms testified that he saw Bentvena and Struzzieri go into the apartment building, then Monastersky came out and joined Georgio, then Bentvena and Struzzieri came out of the building and went to a Chevrolet parked nearby, Bentvena took a brown paper package from the trunk while Struzzieri stood by the car, and then both of them re-entered the apartment building; after that Bentvena and Struzzieri left the apartment building and went to a nearby bar, they were not carrying anything; they then went back to the apartment building and later they again left there, driving to Valley Stream, Long Island, Bentvena being the driver, and Struzzieri was looking back out of the rear window of the car (Tr. 314-322). The cross examination of Wurms brought out that he had not spoken of any brown paper package at the prior trial (Tr. 365-370), and that his opportunities for accurate vision under nighttime conditions and at the street distances involved were poor (Tr. 327-370).

Narcotics Agent Fitzgerald, who had not testified in either of the prior trials (Tr. 395-396), testified practically word-for-word along the same lines as Wurms (Tr. 385-392). Fitzgerald claimed that he could see the brown color of the package which Bentvena allegedly took out of the trunk of the car, at a distance of at least 75 to 80 feet under poor nighttime lighting conditions (Tr. 416).

7. The Defense Motions

The motions at the end of the Government's case appear at Tr. 438-444; they were renewed at the end of the entire case at Tr. 460-461. The grounds of the motions were substantially those urged in our "Reasons", *infra.*

8. The Decision of the Court of Appeals; the Petition for Rehearing in the Court of Appeals

Under our "Reasons", *infra,* we are obliged to present a rather detailed analysis of the opinion of the Court of Appeals, because we contend that the Court misapprehended our arguments addressed to the issues as to the proper standards for submission of the case to the Jury. This contention of ours that the Court of Appeals misapprehended our formulation of the issues, and that it did not come to grips with the issues, was presented by us to that Court in a petition for rehearing*, which was denied.

The within petitioners Bentvena and Struzzieri confined their prayer in the Court of Appeals to one for reversal with directions to dismiss the indictment. We did not request a remand for a new trial. We took the position in the Court of Appeals that the proofs in this trial record demonstrate that the Government has no case for indictment or trial against these petitioners, and that both the interests of Federal criminal justice and the sheer financial and emotional inability of the petitions to sustain the ordeal of a fourth trial favored either an order of affirmance or an order of reversal with directions to dismiss the indictment.

Reasons for Granting the Writ

We realize that we are undertaking, in this certiorari application, a forbidding task in requesting this Court to

* The petition for rehearing is part of the certified record previously filed herein by the co-petitioner Monastersky.

devote its busy attentions to a criminal trial record in order to determine whether the proofs were sufficient for submission to a jury as a matter of law. We respectfully suggest that our request is justified because the case affords a proper occasion for this Court to consider also an aspect of general importance to the administration of Federal criminal justice, namely, the question (posed in our "Question Presented" No. 2) as to whether there are not necessarily situations, of which this case is an example, where a Federal trial Judge in a criminal case should take on the responsibility and the duty of deciding as a matter of law that the case is unworthy for submission to a jury because reasonable men could not differ in concluding that a reasonable doubt exists. This standard which we are suggesting for judicial screening of the Government's proofs in Federal criminal prosecutions is not the conventional "*prima facie* case" standard.

We take it that the Court of Appeals' reversal of the convictions of Bentvena and Struzzieri in the second trial imported into this prosecution, or should have imported, that in any retrial of those two defendants the utmost judicial care should be observed to insure, once and for all, that the actual proofs of guilt distinctly affecting these two defendants, and nothing else, should be determinative. From the outset of this prosecution the supposed proofs relating to Bentvena and Struzzieri have been not only of the merest collateral character in the circumstantial sense, but they have been also of that merely tendentious character which the law so strongly discountenances as amounting to mere "guilt by association".

Just as there was apparently no doubt—in the view which the Court of Appeals took of the prior appeal—that Bentvena and Struzzieri could scarcely have been convicted in the second trial without the prejudicial overflow of conspiracy "hearsay", so we submit, there can be no doubt that a conviction would have been impossible in this third trial without the mass of evidence (all "hearsay" as

to Bentvena and Struzzieri) of the alleged activities of McGovern and Monastersky. For the proofs distinctly affecting Bentvena and Struzzieri, respectively, are in themselves so thin. The Trial Court expressed the view in this trird trial, about midway through the trial, that the Jury might infer that the defendants were all "acting in concert", "and even though there is no conspiracy charged the joint action on the conduct of one is binding on the other" (Tr. 244). On the other hand, in its charge to the Jury, the Court instructed that Agent Georgio's conversations when Bentvena and Struzzieri were not present were not binding on Bentvena or Struzzieri (8a). Under what thus appears to have been the Trial Court's final view of the situation, it must be taken that the only probative matters in this trial record concerning Bentvena and Struzzieri are those which relate specifically to their own directly proved alleged activities.

So viewing the trial proofs, it is impossible, we repeat, to see how the Trial Court could have deemed the case appropriate for submission to the Jury.

Thus, as to Struzzieri under the Fourth Count, the evidence consists solely of Agent Georgio's testimony that the package of January 6, 1959 was wrapped in blue Christmas paper, Agent Mangiaracina's directly contrary testimony that it was wrapped in brown paper, Agent Ward's testimony that he saw Struzzieri carrying a blue and white Christmas type package, Agent Schrier's and Agent Ward's testimony of seeing Struzzieri enter McGovern's apartment building, Agent Schrier's testimony of seeing Struzzieri in McGovern's company on the street and entering McGovern's building with him, Agent Schrier's testimony of hearing Orlandino say to Struzzieri that he hoped "this guy trusts Sammy with the money the next time", and Agent Morgan's testimony of an intriguingly similar kind of conversation in still another place where (this time) Struzzieri was the one who said to Orlandino something in criticism of the way "this guy" paid the money.

Aside from the irreconcilable conflict between Agent Georgio and Agent Mangiaracina as to the appearance of the package, we respectfully emphasize also the shattering impeachment of the testimony of Agent Ward which was the sole testimony linking Struzzieri with the alleged Christmas type package, and which depended upon observational opportunities that simply did not and physically could not exist.

As to the testimony of the alleged conversations concerning the unsatisfactory financial manners of "this guy", this was never acceptably tied in with any claimed happenings between Agent Georgio and the sellers from which it might be inferred that Struzzieri knew Georgio was being cautious about payment of the mony. Indeed this whole branch of the case can hardly be called even speculative.

The fact therefore seems to be undeniable that Struzzier's conviction and sentence under the Fourth Count depends upon an impermissible series of the most attenuated kind of inferences, all of which is moreover to be evaluated in the light of the extremely poor probative quality of the testimony concerning the wrappings on the package (Agent Georgio *versus* Agent Mangiaracina) and the alleged observation of Struzzieri carrying a Christmas-wrapping type of package (Agent Ward).

As to the alleged transaction of January 13, 1959, involving both Bentvena and Struzzieri, the sole testimony is by Agent Georgio that he saw the name "Connors" on McGovern's doorbell, that he saw Bentvena and Struzzieri in and around the apartment building, and that while he was in McGovern's apartment he heard the intercom buzzer (after he had seen Bentvena and Struzzieri in the lobby); the testimony of Agent Mangiaracina that he saw Bentvena and Struzzieri coming down the stairs and in the lobby, heard Bentvena say "Connors" while pressing a buzzer, and saw Bentvena and Struzzieri later again go in and out of the apartment building; the testimony of Agent Schrier

that he saw Bentvena and Struzzieri coming out of the building; and the testimony of Agents Wurms and Fitzgerald that they saw Bentvena and Struzzieri go in, then out of the building, then saw Bentvena take a brown paper package from the trunk of a car while Struzzieri stood by the car, then saw them again enter and leave the building and drive to Long Island with Struzzieri peering out of the rear window of the car.

Again, this testimony by the Government witnesses concerning Bentvena and Struzzieri in relation to the alleged happenings of January 13, 1959, establishes nothing more than that they were seen in or around the apartment building, that Bentvena took a really rather nondescript package out of a car and into the apartment building, and that they later drove away with Struzzieri apparently acting in a furtive manner.

Again also, the alleged observations by Agents Wurms and Fitzgerald of the removal of the package from the car by Bentvena, are to be evaluated in the light of the cross examination as to the extreme implausibility (to say the least) of the agents' having had the necessary visual opportunity.

No Government witness testified to seeing Bentvena or Struzzieri in possession of any narcotics, or engaging in any money transactions.

It is impossible to avoid the conclusion that Bentvena and Struzzieri have been convicted in this case on the basis of mere suspicion arising from their presence in the vicinity and "guilt by association".

While we of course realize that neither the Court of Appeals nor this Court sits to review the Jury's findings as to credibility of witnesses or in regard to conflicting evidence, the decisions do nevertheless indicate that, in a proper case, the Federal Courts of Appeals are willing to exercise a power of factual review to avoid plain

injustice. Thus, in *Farrar* v. *United States*, 275 F. 2d 868 (C.A. D.C. 1960), where issues of veracity were involved, the rule was followed that "we must reverse a criminal conviction when it is 'clear to us that upon the evidence * * * a reasonable mind must necessarily have had a reasonable doubt as to * * * guilt'" (at p. 870).

Cf. especially the earnest and scholarly proposals of the late Judge Jerome Frank in his concurring opinion in *United States* v. *Castro*, 228 F. 2d 807 (C.A. 2 1956), that the Federal trial and appellate courts should determine whether a criminal case is improper for submission to the jury because reasonable men could not differ in believing that a reasonable doubt exists.

It was open to the Court of Appeals to apply this salutary canon (proposed by the late Judge Frank) in this case, the instant trial record being a particularly apt one for the purpose.

Cf. also *United States* v. *Litberg*, 175 F. 2d 20, 21 (C.A. 7 1949), reversing a conviction for passing counterfeit money, where the Court said, "* * * while the trier of the facts is entitled to draw all reasonable inferences from the circumstances in proof, a court of review is charged with the responsibility of determining the reasonableness of such inferences." Cf. also *Cartright* v. *United States*, 335 F. 2d 919 (C.A. 10 1964), where, although the conviction was affirmed because "there was detailed and substantial evidence properly before the Jury to sustain the verdict", the Court also said "in examining the evidence to determine whether it is substantial * * *, it must clearly do more than raise a suspicion of the existence of the facts sought to be established, or a suspicion of guilt" (at p. 921). Similarly in *United States* v. *Conti*, 339 F. 2d 10, 13 (C.A. 6 1964), while affirming the conviction, the Court said "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".

The authorities just cited plainly denote, we submit, that this Court—or a Federal Court of Appeals—sitting in review of a criminal conviction is far from powerless to apply its corrective hand when, as we respectfully maintain is the case here, there has been an outright miscarriage of justice on the facts, i.e., in point of their manifest insufficiency for submission to the Jury or for conviction.

In essence, then, the argument which we presented to the Court of Appeals was that no case was made out for submission to the Jury, and we specifically asked the Court to apply the standard that a criminal case should be determined by the Trial Court to be improper for submission to the Jury when, in the Trial Court's own judicial opinion as a matter of law, the proof is such that reasonable men could not differ in believing that a reasonable doubt exists.

While the Court of Appeals' opinion affirming the convictions correctly noted that we were urging the issue of the sufficiency of the evidence to permit the case to be submitted to the Jury, the opinion did not distinctly consider the above-mentioned standard, and there is language in the opinion indicating that the Court was declining (or failing) to differentiate between (1) the question of the Trial Court's justification for submitting the cases to the Jury, and (2) the substainability of the Jury verdict as such based on the evidence submitted for the jurors' consideration.

Thus, at page 1024 of the slip opinion*—where the Court discusses the co-appellant Monastersky, but where the Court's analysis and language evidently bear on the case as a whole—the Court speaks in the same paragraph of (1) its being "quite clear that the Government's case * * * was sufficient to go to the Jury", and (2) of the justification for the Jury's verdict as such, i.e., "We surely cannot disturb a jury verdict based on such evidence".

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* In printing the opinion in the Appendix hereto, *infra*, we have retained the original page numbers, enclosed in brackets at the bottom of each page.

Thus also at pages 1024-1026 of the slip opinion, where the Court speaks of the January 6 count involving Struzzieri, the Court (1) does several times refer to whether there was sufficient evidence to go to the Jury, but the Court (2) also writes in terms of the Jury's province of "resolution" of a "variance" in the evidence, and then the Court goes on to discuss not only whether the case should have been submitted to the Jury under such theory of the Jury's right to resolve the variance, but also the Court speaks in terms denoting that the Court was also finding that the Jury had correctly resolved the variance in the evidence—in this last regard see the Court's statement at page 1026 that "We should not disturb this permissible resolution of the variance since this is precisely the sort of task that juries are best able to perform".

From these combined features of the Court of Appeals' reasoning at pages 1024-1026, it is plain that the Court was not distinctly preserving the analytical differentiation between the issues of (1) whether a case was made out for submission to the Jury, and (2) whether the Jury verdicts are sustainable.

Similarly, in the full paragraph which starts and ends on page 1026 the Court juxtaposed indistinct aspects of the latter two ideas, in the sentence reading "In other words, Struzzieri's claim is not that the Government failed to present evidence from which reasonable men could be convinced of a certain fact beyond a reasonable doubt; rather he claims that the physical facts so contradict Ward's testimony as to render that testimony unbelievable". And then the Court states that, "Deciding whether certain evidence should be believed is precisely the task set the Jury in a prosecution such as this; we should not interfere with the Jury's decision in this case that Ward's testimony was credible". In this item the Court of Ap-

peals not only dealt indistinctly with the separate issues of propriety of the case for submission to the Jury on one hand and propriety of the Jury verdict on the other hand, but also the Court did not give us the benefit of distinctly perceiving that our claim was precisely that which the Court said it was not, i.e., we say our claim was that the Government did fail to present evidence from which reasonable men could be convinced of a certain fact beyond a reasonable doubt; and we therefore also respectfully say that the Court did not give us the benefit of considering adequately our distinct contention that this is a proper case for applying the test of whether the Trial Judge as a matter of law should have kept the case from the Jury because reasonable men could not differ in determining that a reasonable doubt existed.

Altogether, in this last portion of the Court of Appeals' opinion of which we are here speaking—the full paragraph appearing on page 1026 of the opinion—the Court simply did not consider and decide our fundamental contention that this was a suitable case for applying the latter test, rather than the more conventional test of whether a "*prima facie* case" had been made out for submission to the Jury.

As regards the January 13 count (slip opinion, pp. 1026-1028), there is again, an important element of indistinctness in the Court of Appeals' analysis of the separate issues of sufficiency of the case for submission to the Jury and maintainability of the Jury verdict. For, the Court refers (p. 1028) both (1) to "Considerations similar to those that caused us to affirm the Jury's verdict of guilty based on the evidence relating to the January 6 sale"—the Court's language continuing at this point with the words "cause us to hold that the evidence introduced by the Government relating to the January 13 sale was sufficient to support the Jury's verdict of guilty as to the latter transaction"—and (2) to the theme that "we cannot say that reasonable jurors

could not have found beyond a reasonable doubt that Struzzieri and Bentvena delivered the heroin," etc. Here again, then, there occurs in the Court of Appeals' reasoning a kind of merger or blend as between the issue of sufficiency of the case for submission to the Jury and the issue of the evidentiary adequacy of the Jury verdict. But more important, there seems to be present here again, in the Court of Appeals' reasoning, an indistinctness in the Court's approach to our fundamental argument that it was for the Trial Court in the first instance to rule as a matter of law that the case should not have been submitted to the Jury because reasonable men could not differ in finding that a reasonable doubt existed on the face of the Government's proofs.

Nowhere in the Court of Appeals' opinion is there any discussion of the latter test which we were above all asking that Court to consider and to apply, the test of whether the proofs were such that the Trial Judge should have withheld the case from the Jury because as a matter of law reasonable men could not differ in finding that a reasonable doubt was present. True, the omission from the Court of Appeals' opinion of any explicit discussion of this latter test may well reflect that Court's deliberate declination to take up our proposal that such test was the right one to be considered and applied in this case. However, we respectfully feel justified in requesting this Court to consider the point because of its general importance and in justice to our petitioners herein.

CONCLUSION

It is respectfully submitted that this joint petition for writ of certiorari should be granted.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioners,
William Bentvena and William Struzzieri

APPENDIX

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 63—September Term, 1965.

(Argued October 20, 1965 Decided February 23, 1966.)

Docket No. 29732

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

WILLIAM BENTVENA and WILLIAM STRUZZIERI,

Defendants-Appellants.

Before:

WATERMAN, MOORE and FRIENDLY,

Circuit Judges.

Each defendant was convicted of selling narcotics in violation of 21 U.S.C. §§ 173-74. The United States District Court for the Southern District of New York, McGohey, *J.*, rendered a judgment of guilty after a jury trial, and the defendants appealed. Affirmed.

HOWARD L. JACOBS, Asst. United States Attorney, Robert M. Morgenthau, United States Attorney, Neal J. Hurwitz, Asst. United States Attorney, *for Appellee.*

JEROME LEWIS, Brooklyn, N. Y., *for Appellants Bentvena and Struzzieri.*

ROBERT KASANOF, New York City, *for Appellant Monastersky.*

WATERMAN, *Circuit Judge*:

By this opinion we affirm the convictions of three codefendants, who, having been charged with violations of 21 U. S. C. §§ 173, 174 on January 6 and January 13, 1959, were each severally found by a jury to be guilty as charged. Samuel Monastersky and William Struzzieri were convicted of unlawful involvement on both occasions, William Bentvena as to the January 13 violation only.[1]

On this appeal, appellants Bentvena and Struzzieri argue that the judgments against them should be reversed and the pertinent counts of the indictment dismissed as to them,[2] because the Government's proof tending to show their guilt was so meager that the trial court erred in failing to direct verdicts in their favor at the close of the Government's case. Appellant Monastersky states his willingness to adopt his codefendants' argument as his own should it commend itself to this court, but he mainly relies upon the argument

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[1] The indictment out of which these convictions arise was filed on May 5, 1960. It named twenty-nine defendants and contained eight counts. The first trial on the indictment ended in a mistrial after six months. The second trial resulted in the conviction of thirteen defendants, including the present appellants, on counts four and five charging substantive violations of the narcotics laws and on count eight, the general conspiracy count. On June 13, 1963 our court affirmed the convictions of nine of the defendants but reversed the convictions of appellants and the defendant Salvatore Panico and remanded for a new trial. *United States v. Bentvena*, 319 F. 2d 916 (2 Cir.), *cert. denied*, 375 U. S. 940 (1963). This appeal follows the third trial.

[2] Appellants Bentvena and Struzzieri seek only a reversal with directions that the indictment be dismissed, they do not seek a new trial.

that the Government should not have been allowed to avail itself of the evidentiary rule contained in 21 U. S. C. § 174[3] because it failed to prove he had possession of the heroin that was the subject matter of the transactions of January 6 and January 13. He concludes that without the benefit of this rule his conviction cannot stand. We take up these separate contentions in order.

I.

The initial issue is whether the evidence presented by the Government during its case-in-chief was sufficient to permit the cases against any or all of these defendants to be submitted to the jury. We look first to the evidence relating to the January 6 transaction in which only Monastersky and Struzzieri were allegedly involved. The case against these two codefendants, based almost entirely on the trial testimony of several federal narcotics agents, can be briefly summarized. On January 5, Agent Giorgio had arranged with Monastersky to purchase from him on the following day one-half kilogram of heroin for $6,000. At about 8:40 P.M. on January 6 several agents observed Monastersky enter 525 East 88th Street. Several minutes later a car arrived on the scene and parked. Struzzieri got out and entered the same building Monastersky had previously entered. A second federal agent, Agent Ward, testified that when Struzzieri left the car and entered the build-

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[3] It is a federal offense under Section 174 to import narcotics illegally or to deal in such drugs with knowledge that they have been illegally imported. The statute goes on to provide: "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." In the present case Monastersky argues the Government did not prove he had or had had possession of the heroin which was the subject of the illegal transactions.

ing he was carrying a package wrapped in blue paper on which appeared a white snow man design. Shortly thereafter Struzzieri left the building empty handed and drove off in the same car in which he had arrived. At about 9:30 P.M. one Richard McGovern left 525 East 88th Street carrying a package and proceeded to 448 East 87th Street. A short time later Monastersky brought Agent Giorgio to 448 East 87th Street. There they met McGovern in an apartment in this building, McGovern produced a package wrapped, according to Giorgio, in blue paper on which appeared a white snow man design and the package, when opened, contained a white powder later proved to be heroin. The three men then left the apartment; once outside Giorgio handed McGovern $6,000 and McGovern gave the agent the package, which contained about one-half a kilogram of heroin. Giorgio took the package to an automobile where a third agent, Agent Mangiaracina, was waiting. There was also testimony tending to show that Struzzieri met McGovern for a few minutes later in the evening.

Assuming for the moment that the trial court correctly charged the jury that it could find Monastersky had "possession" of the heroin sold on January 6 sufficient to justify reliance on the rule contained in 21 U. S. C. § 174 it is quite clear that the Government's case against Monastersky relative to this January 6 sale was sufficient to go to the jury. Indeed, the evidence tending to prove that Monastersky was actively involved in this unlawful sale was largely uncontradicted. We surely cannot disturb a jury verdict based on such evidence. See *United States* v. *Dardi*, 330 F. 2d 316 (2 Cir.), *cert. denied*, 379 U. S. 845 (1964).

Whether the Government's case concerning the January 6 sale of heroin made out a case against Struzzieri sufficient to go to the jury is a closer question. Essentially, the Government's case against Struzzieri consists of Giorgio's tes-

timony that he received the heroin from McGovern and Monastersky in a package wrapped in blue paper on which appeared a white snow man design, and the testimony of Ward that he observed Struzzieri carrying just such a package enter 525 East 88th Street shortly after Monastersky had entered the building and only a few hours before a package so wrapped was passed to Giorgio. The Government contends this evidence was sufficient to allow a reasonable jury to find that Struzzieri brought to McGovern and Monastersky the heroin that the latter pair then sold to Giorgio. Struzzieri argues that the issue of his guilt should not have been submitted to the jury because crucial testimony of several narcotics agents was "meager," "remote," and "incredible."

In support of his argument Struzzieri first points to the fact Agent Mangiaracina, who waited in an automobile for Giorgio to return with the heroin on the evening of January 6, testified the package Giorgio brought with him to the automobile was brown in color. Unquestionably, this testimony as to the color of the package varied from Giorgio's testimony that the package was blue and white. Nevertheless, the jury could well have determined that Mangiaracina was mistaken in his recollection of the color and that Giorgio's testimony was to be believed. Such a resolution of the variance, which would tend to incriminate Struzzieri, would be supported by the testimony of Agent Ward who stated that the package Struzzieri carried when he entered 525 East 88th Street was wrapped in blue paper on which appeared a white snow man design. We cannot say that such a resolution of this evidential variance would be unreasonable; therefore we should not replace it with our own. This is not a case in which two segments of the Government's proof were absolutely essential to support a conviction and each contradicts the other. *United States* v.

Moret, 334 F. 2d 887, 893 (2 Cir. 1964) (Waterman, *J.*, dissenting), *cert. denied*, 379 U. S. 993 (1965). Rather, here there was a conflict in the Government's proof tending to establish only one fact among many facts that together tended to prove Struzzieri was carrying the package that contained the heroin subsequently sold to Giorgio. Undeniably the variance as to the color of the wrapping paper weakened the Government's case against Struzzieri. Nevertheless, the jury concluded the package that Giorgio received from Monastersky and McGovern was the package Struzzieri brought to the latter pair earlier in the evening. We should not disturb this permissible resolution of the variance since this is precisely the sort of task that juries are best able to perform. *United States* v. *Dardi, supra; United States* v. *Tutino*, 269 F. 2d 488 (2 Cir. 1959).

Struzzieri also contends the Government's case tending to involve him in this January 6 transaction was fatally weak because Agent Ward's testimony that he observed Struzzieri enter 525 East 88th Street carrying a package wrapped in blue paper on which appeared a white snow-man design was incredible and unworthy of belief because of the distance separating Ward from Struzzieri and the poor lighting conditions at that time. In other words, Struzzieri's claim is not that the Government failed to present evidence from which reasonable men could be convinced of a certain fact beyond a reasonable doubt; rather he claims that the physical facts so contradict Ward's testimony as to render that testimony unbelievable. We disagree. Deciding whether certain evidence should be believed is precisely the task set the jury in a prosecution such as this; we should not interfere with the jury's decision in this case that Ward's testimony was credible.

We next turn to consider whether the Government's evidence relating to the January 13 transaction in which all

of the defendants were allegedly involved was sufficient to permit the case against any or all of them to be submitted to the jury. Again, the case against Monastersky, Struzzieri and Bentvena was based almost entirely on the trial testimony of several narcotics agents, and it, too, can be briefly summarized. Agent Giorgio made arrangements with Monastersky to purchase another half kilogram of heroin on January 13 from Monastersky and McGovern for $6,000. On that date, at about 9:25 P.M. Bentvena and Struzzieri arrived in a car on East 88th Street; they parked and entered the apartment building numbered 525. Shortly thereafter Monastersky came out of this building and met Agent Giorgio who had been waiting in the immediate vicinity for some time. Giorgio introduced Agent Mangiaracina to Monastersky as his partner and while Mangiaracina waited in the lobby of the building Monastersky and Giorgio made their way to apartment 2-H, which was McGovern's apartment. While doing so they met Struzzieri and Bentvena coming toward them in the opposite direction. When Bentvena and Struzzieri arrived in the lobby Mangiaracina observed Bentvena stop and speak into the intercom system; at approximately the same time Giorgio observed McGovern go to the intercom connection in apartment 2-H and speak into it, saying, "Everything is okay." Mangiaracina then saw Struzzieri leave the building, while agents outside saw them walk to their car, remove a brown package from the trunk, and together return to the lobby where Mangiaracina saw them go upstairs again. Shortly thereafter, according to Giorgio, the doorbell rang in apartment 2-H, McGovern answered the bell and returned with a brown package ultimately found to contain heroin. Bentvena and Struzzieri were observed leaving the building a few miuntes after their last entry. In the meantime, Mc-

Govern had asked Giorgio for the money. Giorgio summoned Mangiaracina, his supposed partner, from the lobby, the agents handed an envelope containing $6,000 to Monastersky, and Monastersky handed the package of heroin to Giorgio. Subsequently Struzzieri and Bentvena returned to 525 East 88th Street, where they remained for about an hour.

Considerations similar to those that caused us to affirm the jury's verdict of guilty based on the evidence relating to the January 6 sale cause us to hold that the evidence introduced by the Government relating to the January 13 sale was sufficient to support the jury's verdict of guilty as to the latter transaction. Viewing the evidence, as we must, in the light most favorable to the Government, *United States* v. *Tutino, supra,* and recognizing that involvement in an illegal sale of narcotics may be proved by circumstantial evidence, *United States* v. *Moret, supra,* we cannot say that reasonable jurors could not have found beyond a reasonable doubt that Struzzieri and Bentvena delivered the heroin to Monastersky and McGovern which they, in turn, sold and delivered to Giorgio. And, of course, Monastersky's involvement in the transaction is firmly established.

II.

We now examine the claim of appellant Monastersky that his conviction on both counts should be reversed because, as the record does not show that the heroin sold to the agents was illegally imported, or that Monastersky knew from where it came, his conviction can only stand if the Government proved he had "possession" of the drugs,[4] which, he maintains, the Government failed to do. Monastersky contends the Government's proof establishes only

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[4] See note 3, *supra.*

that he was a "casual facilitator" of the sales in question, in other words that he merely introduced a willing seller to a willing buyer, activity that we held was insufficient to establish possession, either actual or constructive, in *United States* v. *Jones*, 308 F. 2d 26 (2 Cir. 1962). We disagree with appellant. We believe the evidence in this case established that Monastersky had, on both occasions, power to control the disposition of the heroin sufficient to constitute "possession" within 21 U. S. C. § 174. See *United States* v. *Jones, supra.* In *Jones* we reversed a conviction under § 174 that equated mere participation in a sale of narcotics with "possession" of the narcotic drug. In discussing the facts of that case we said:

> We believe the evidence in this case negates a conclusion that defendant Jones had dominion and control over the narcotics handed to Brown by Moore. The pains Jones took in the first instance to find Moore indicate that Jones was unable to consummate the transaction as a business dealing of his. The price and place of delivery were not even discussed with the would-be purchaser until defendant spoke with Moore. No one can say that Jones established these essential details of the affair unless he engages in speculation wholly unwarranted by the trial record. After consummation of the transaction Moore told agent Brown to purchase directly from him in the future and not to deal with anyone else. This statement by Moore negates a finding that Jones could assure, as a matter of course, delivery by Brown to a customer Jones might discover. [308 F. 2d at 31.]

The facts here are quite different. On both January 6 and January 13 Monastersky apparently set the price of the

heroin without consulting with McGovern. On January 6 Monastersky was in the building when Struzzieri delivered the heroin. At both sales to Giorgio, Monastersky remained with McGovern throughout. And during the January 13 transaction Monastersky had the heroin package in his hands, Giorgio paid the money directly to Monastersky, and Monastersky handed the heroin directly to Giorgio. This evidence brings Monastersky's case well within our statement in *Jones* that "evidence showing that a given defendant set the price for a batch of narcotics, had the final say as to means of transfer, or was able to assure delivery, may well be sufficient to charge the defendant with a constructive possession of the narcotics . . ." 308 F. 2d at 31.

Monastersky also contends that the trial court's charge relating to constructive possession was improper. We would be hard pressed to detect error in this charge. In any event, since Monastersky failed to object to the charge at trial, or to request a different charge, he may not, barring special circumstances not present here, raise the issue on appeal. *See United States* v. *Indiviglio*, 352 F. 2d 276 (2 Cir. 1965), *cert. denied*, Feb. 21 1966, —— U. S.——.

Affirmed.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statement	2
Argument	7
Conclusion	10

CITATIONS

Cases:

Bass v. *United States*, 326 F. 2d 884, certiorari denied, 377 U.S. 905	9
Brothers v. *United States*, 328 F. 2d 151, certiorari denied, 377 U.S. 1001	9, 10
Hernandez v. *United States*, 300 F. 2d 114	9
Lucero v. *United States*, 311 F. 2d 457, certiorari denied *sub nom. Maestas* v. *United States*, 372 U.S. 936	T, VJ
United States v. *Bentvena*, 319 F. 2d 916, certiorari denied *sub nom. Mirra* v. *United States*, 375 U.S. 940	3
United States v. *Carter*, 320 F. 2d 1	9
United States v. *Davis*, 281 F. 2d 93, reversed on other grounds, 364 U.S. 505	9
United States v. *Hernandez*, 290 F. 2d 86	10
United States v. *Jones*, 308 F. 2d 26	9
United States v. *Landry*, 257 F. 2d 425	9
United States v. *Malfi*, 264 F. 2d 147, certiorari denied, 361 U.S. 817	9
United States v. *Pisano*, 193 F. 2d 355	9
United States v. *Taylor*, 266 F. 2d 310, certiorari denied, 361 U.S. 853	9

Statute:

21 U.S.C. 173	2
21 U.S.C. 174	2

220-406—66

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1234

SAMUEL MONASTERSKY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1303

WILLIAM BENTVENA AND WILLIAM STRUZZIERI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 1234, App. A; Pet. No. 1303, p. 21; R. 51a)[1] is reported at 357 F. 2d 58.

[1] "R." refers to the appendix to appellants' brief in the court below, which has been filed in this Court with the petition in No. 1234. "Tr." refers to the transcript of the trial proceedings.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1966 (Pet. No. 1234, App. B; R. 61a). On March 17, 1966, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari in No. 1234 to April 23, 1966, and the petition in that case was filed on April 19. In No. 1303, a petition for rehearing in the court of appeals was denied on March 14, 1966 (R. 76a, 78a); on April 13, 1966, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to May 13, 1966; and the petition was filed on May 12.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support the convictions.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners Monastersky and Struzzieri were convicted under two counts, and petitioner Bentvena under one count, of an indictment charging narcotic offenses in violation of 21 U.S.C. 173 and 174.[2] Monastersky, as

[2] This was petitioners' third trial. The first trial, under an indictment that named petitioners and twenty-six other defendants, ended in a mistrial. The second trial resulted in the conviction of petitioners and ten others on two substantive counts and one of conspiracy. The court of appeals affirmed the convictions of nine of the defendants but reversed as to petitioners and one other. It held that the participation of these three defendants in the conspiracy had not been proved and

a multiple offender, was sentenced to imprisonment for 15 years. Struzzieri and Bentvena were given 6-year terms. The Court of Appeals for the Second Circuit affirmed unanimously. 357 F. 2d 58.

The evidence showed that on January 5, 1959, Federal Narcotic Agent Giorgio, acting in an undercover capacity, was introduced to petitioner Monastersky in Manhattan by an informant. Monastersky invited Giorgio to a social club and asked how much narcotics he wanted, stating that he could supply any amount, that he did not sell less than "half-kilo lots," and that his price was $6000 for a half kilogram; and assuring Giorgio that the narcotics would be "100 per cent pure and untouched." When Giorgio indicated that he wanted a day or two to consider the matter, Monastersky gave him his telephone number and suggested that Giorgio call him the following day at 2:30 p.m. Giorgio did so and ordered one-half kilogram for $6000. Monastersky directed Giorgio to meet him at a designated spot at 10:15 that evening (Tr. 3–8, 160–161).

At about 8:40 p.m. surveilling agents saw Monastersky drive to and enter an apartment house at 525 East 88th Street. Several minutes later another car, driven by one Orlandino, arrived on the scene. Petitioner Struzzieri alighted from this car. He entered the apartment house, carrying a package wrapped in blue

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that the admission against them of evidence relating to the conspiracy had been prejudicial error, and remanded for a new trial on the substantive counts. *United States* v. *Bentvena*, 319 F. 2d 916, 947–956 (C.A. 2), certiorari denied *sub nom. Mirra* v. *United States*, 375 U.S. 940.

Christmas paper with a white snowman design, and shortly emerged empty-handed and drove away with Orlandino. Monastersky then left the apartment house and drove away (Tr. 162–164, 166–167, 258–263, 282). At about 9:30 p.m., one Richard McGovern left the same apartment house carrying a package similar to the one Struzzieri had taken into the premises. He walked, followed by agents, to 448 East 87th Street (Tr. 263).

Agent Giorgio met Monastersky that evening at the appointed place and Monastersky told the agent that his partner had the "stuff" and was waiting at an apartment on 87th Street. They went there and were admitted to an apartment where Monastersky introduced Giorgio to McGovern, who produced a package wrapped in blue Christmas paper with a snowman design. The agent opened the outer wrapper and removed a brown paper bag, which held a clear plastic bag containing a white powder subsequently found to be heroin. The three men left the apartment when Giorgio said that the purchase money was in his automobile. Outside the building, Giorgio removed $6000 from the trunk of a government car—where his ostensible "partner" (Agent Mangiaracina) waited—and handed the money to McGovern, who in turn handed Giorgio the package containing one-half kilogram of heroin (Tr. 8–17, 89–91, 169–171, 264–265).

Later that evening, surveilling agents followed Monastersky and McGovern back to the apartment house at 525 East 88th Street, and Struzzieri was seen entering the building with McGovern (Tr. 171–172).

Five minutes later Struzzieri left the building, entered an automobile with Orlandino and drove to a diner, where Orlandino was heard to say to him, "I hope this guy trusts Sammy with the money the next time" (Tr. 172–173, 175–176, 304–306).[3]

On January 13, 1959, Agent Giorgio telephoned Monastersky. Monastersky asked him whether he was satisfied with the merchandise and ready to negotiate further. Giorgio replied that he would like to purchase the same amount of heroin. Monastersky instructed Giorgio to meet him at 8:30 p.m. at a particular intersection. Giorgio complied. The two proceeded to 525 East 88th Street. There Monastersky pressed a buzzer for apartment 2–H, listed in the names of "Connors and McGovern". The apartment door was opened by McGovern. He conversed briefly with Monastersky. Monastersky then explained to Giorgio that the "junk" had not yet arrived and instructed that he meet him again at 9:30 in front of the building. The two separated (Tr. 23–27, 98–100, 177–178).

At 9:25 p.m., when Agent Giorgio was, as instructed, waiting in front of the apartment house on 88th Street, petitioners Struzzieri and Bentvena walked past him and entered the building. Five minutes later Monastersky emerged from the building and suggested that Giorgio join him in a walk. During the walk Monastersky asked about the purchase money, and the agent replied that his partner had

[3] There was also testimony that earlier the same evening Orlandino and Struzzieri were heard to converse about a "guy" who should pay on demand (Tr. 246–247).

the money. He called Agent Mangiaracina from a government vehicle parked nearby and, in the vestibule of the apartment house, introduced him to Monastersky as his partner "Joe". He instructed Mangiaracina to wait in the corridor with the money while he and Monastersky proceeded upstairs to apartment 2–H. As the two men entered the apartment, Bentvena and Struzzieri emerged from it (Tr. 27–29, 102, 314–317, 383–388). In the lobby, Agent Mangiaracina saw Bentvena and Struzzieri descend and noticed Bentvena approach the intercom system and press a buzzer. Mangiaracina heard the word "Connors" before the door closed (Tr. 104). At approximately the same moment Agent Giorgio in apartment 2–H observed McGovern answer the intercom and say, "Everything is O.K." (Tr. 43). Surveilling agents outside the building saw Bentvena and Struzzieri emerge and approach their parked car. Bentvena removed a brown package from the trunk of the car and, together with Struzzieri, re-entered the building, passed Agent Mangiaracina in the lobby, and proceeded upstairs (Tr. 105–106, 318, 388–390). At about the same time, Agent Giorgio in apartment 2–H heard the doorbell ring and saw McGovern answer it and return with a brown package containing a plastic bag of heroin. The agent inspected it and said he would take it. (Tr. 42–43.) Bentvena and Struzzieri meanwhile were observed leaving the building empty-handed (Tr. 106, 319, 390). Giorgio, asked by McGovern for the purchase money, summoned his "partner", Agent Mangiaracina, from the lobby.

They handed an envelope containing $6000 to Monastersky, Monastersky in turn delivered the package of heroin to Giorgio, and the agents departed (Tr. 46–47, 106–109). Subsequently Struzzieri and Bentvena were observed returning to this apartment house, where they remained for approximately one hour (Tr. 180, 320, 390).

ARGUMENT

1. Petitioners Bentvena and Struzzieri argue that the evidence against them was so weak that a verdict of acquittal should have been directed. We submit that there was sufficient evidence to support their conviction. The testimony of Agent Ward was unequivocal that on January 6 Struzzieri carried into an apartment house a package wrapped in blue Christmas paper with the imprint of a white snowman, and that McGovern emerged a short time later with a similar package, which he carried to the place where later that day Agent Giorgio purchased a package of heroin (Tr. 258–263, 282); Ward adhered to this description of the package throughout intensive cross-examination (including a defense-requested courtroom demonstration of distance and visibility, see Tr. 280–311), insisting that he had seen Struzzieri and the package clearly in a brightly lighted vestibule (see Tr. 261, 282, 290, 291, 308, 309). And agent Giorgio was positive that the package of heroin he purchased that day bore an outer wrapper of blue Christmas paper with the imprint of a snowman, over an inner cover consisting of a brown paper bag.[4]

[4] The only inconsistency in the description of the package resulted from the testimony of Agent Mangiaracina concerning

The testimony of several agents placed Bentvena and Struzzieri at the scene of the January 13 sale. Bentvena was seen carrying a brown paper package as he and Struzzieri entered the apartment house, where near the time of their entry such a package, containing heroin, was tendered at the door of a second floor apartment to McGovern. Moreover, Bentvena and Struzzieri had visited this apartment a few minutes earlier and had apparently been assured by McGovern, "Everything is O.K.". These facts alone, we submit, show actual possession of the narcotics by these defendants, sufficient to sustain their convictions.[5]

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the color of the package carried by Giorgio when the latter entered the government vehicle *after* the consummation of the sale. Somewhat confused as to whether the package then bore an outside wrapping of blue and white Christmas paper, or brown paper (see Tr. 94, 98, 134–139), Mangiaracina finally testified, contrary to Giorgio (Tr. 71–72, 157–159), that the outer wrapper was then brown (Tr. 139–141). In view of the fact that he had been shown both wrappings at the narcotics bureau (Tr. 94), and in view of the undisputed testimony of Giorgio that he unwrapped the package prior to entering the car where Mangiaracina waited, the discrepancy did not require a judgment of acquittal.

[5] The argument that Bentvena and Struzzieri were prejudiced by an "overflow of conspiracy 'hearsay' " (Pet. 12) has no merit. The transcript shows that the trial judge, bearing in mind the history of the case, cautioned government counsel to be careful to restrict his case to evidence pertaining to the substantive offenses charged (see Tr. 30–42). During the trial he repeatedly instructed the jury that evidence admissible only as against Monastersky was not to be considered with respect to Bentvena and Struzzieri (see Tr. 4, 35, 43, 46, 92, 102); he repeated such instructions in his final charge (Tr. 489).

2. Nor is there merit to the claim of petitioner Monastersky that this case evinces uncertainty on the part of the courts of appeals concerning the requirements of proving possession of narcotics. All agree that proof of actual physical possession is not required; that a showing of contructive possession is sufficient; and that the determining factor is whether the defendant had dominion and control of the drug.[6] Such dominion and control was proved here.

The record shows that it was Monastersky who on two occasions made the arrangements with the undercover agent Giorgio for the sale of the heroin. He made representations concerning the quality of the drug and the amount he could deliver, and set the date of delivery and the price without consulting anyone else. On both occasions, he was in the building where, and at the time when, his co-defendents de-

[6] *Brothers* v. *United States*, 328 F. 2d 151 (C.A. 9), certiorari denied, 377 U.S. 1001; *Bass* v. *United States*, 326 F. 2d 884 (C.A. 8), certiorari denied, 377 U.S. 905; *United States* v. *Carter*, 320 F. 2d 1 (C.A. 2); *Lucero* v. *United States*, 311 F. 2d 457 (C.A. 10), certiorari denied *sub nom. Maestas* v. *United States*, 372 U.S. 936; *United States* v. *Jones*, 308 F. 2d 26 (C.A. 2); *Hernandez* v. *United States*, 300 F. 2d 114 (C.A. 9); *United States* v. *Malfi*, 264 F. 2d 147 (C.A. 3), certiorari denied, 361 U.S. 817; *United States* v. *Pisano*, 193 F. 2d 355 (C.A. 7). Petitioner concedes that there is no "direct" conflict between the various circuits on this issue (Pet. 10), and his citation of *United States* v. *Landry*, 257 F. 2d 425 (C.A. 7), to show a latent conflict is wide of the mark. As later decisions have explained, that decision turned on the fact that "control [by the defendant] was expressly negatived" by undisputed proof that sole possession was in another. See *United States* v. *Davis*, 281 F. 2d 93, 100 (C.A. 7), reversed on other grounds, 364 U.S. 505; *United States* v. *Taylor*, 266 F. 2d 310 (C.A. 7), certiorari denied, 361 U.S. 853; *Bass* v. *United States*, *supra*.

livered the heroin to his accomplice McGovern. On each occasion he steered Giorgio to McGovern, and throughout each sale he remained with McGovern. On one occasion he received the purchase price directly from Giorgio and, in turn, handed the heroin directly to him.

From these facts it was reasonable to infer that Monastersky was the primary promoter of the sales and had such control as enabled him without difficulty to procure the drug for a customer. See *United States* v. *Hernandez,* 290 F. 2d 86, 90 (C.A. 2). That is all the statute requires. Indeed, courts have found constructive possession in circumstances far less compelling than these. Cf. *Brothers* v. *United States,* 328 F. 2d 151 (C.A. 9), certiorari denied, 377 U.S. 1001. The intent of the statute would be defeated if liability could be avoided simply by refraining from actual physical contact with narcotics. See *Lucero* v. *United States,* 311 F. 2d 457 (C.A. 10), certiorari denied *sub nom. Maestas* v. *United States,* 372 U.S. 936.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 108

SAMUEL MONASTERSKY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

Supreme Court of the United States

October Term, 1966

No. 108

SAMUEL MONASTERSKY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Samuel Monastersky prays for a re-hearing of a previously denied petition for writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on February 23, 1966. A petition for certiorari was previously denied by this Court on October 10, 1966.

Previous Applications

All previous applications including opinions and statutes were filed in the original petition for certiorari.

Stay of the Mandate

Petitioner Samuel Monastersky prays that the mandate of this Court be stayed pending the filing of the petition for a rehearing pursuant to Rules 51 and 58 of the Supreme

Court of the United States and Rule 28 (c), (2) of the Rules of the United States Circuit Court of Appeals for the Second Circuit.

Reasons for Granting a Rehearing

The petitioner Samuel Monastersky is effectively denied due process of law because of the many times he was compelled to be a defendant in the same criminal case prosecuted by the United States Government. This point has not been raised in the lower court. However, this court can invoke the Plain Error Rule, Rule 52 of the Federal Rules of Criminal Procedure and grant the petitioner relief.

Facts Concerning This Petition for a Rehearing

This petitioner was a defendant in a multiple conspiracy trial in June of 1961 that ended in a mistrial after six months before Honorable Richard H. Levet, United States District Judge, Southern District of New York. Petitioner was then re-tried along with twelve (12) other alleged conspirators and was convicted in a three month trial. Subsequently thereto, this case was reversed by the United States Circuit Court of Appeals in an opinion that in substance stated that by including this defendant in the multiple conspiracy was improper joinder, and ordered a new trial for this defendant and co-defendants, William Bentvena, William Struzzieri and Salvatore Panico. *United States* v. *Bentvena*, 319 F. 2d 916 (2nd Circuit). The petitioner Samuel Monastersky (and co-defendants Bentvena

and Struzzieri) then went to trial again in 1965. Petitioner-appellant was therefore a defendant in three federal criminal actions, cumulative total of approximately thirty-eight (38) trial weeks plus two appeals to the United States Circuit Court of Appeals and one petition for certiorari. This extreme pressure in re-trials and re-hearings could only be to the detriment of the defendant and result in depriving him of due process of law. This Court has never had the opportunity to discuss how many trials a criminal defendant can be subjected to before the time arrives when there is an undue process of law and it is restrictive and impossible for a man to properly defend himself. It is for this point of law that petitioner claims the Supreme Court of the United States at this time should speak out and declare what constitutes a denial of due process of law.

CONCLUSION

For the foregoing reasons, this petition for a rehearing for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH I. STONE
Attorney for Petitioner Monasterski

Certificate

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 108

SAMUEL MONASTERSKY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

I, JOSEPH I. STONE, a member of the Bar of the Supreme Court of the United States and attorney for Samuel Monastersky herein, do hereby certify this petition for re-hearing is submitted in good faith and not for the purposes of delay.

Dated: New York, New York
October 27, 1966.

/s/ JOSEPH I. STONE
Joseph I. Stone
Attorney for Petitioner
Samuel Monastersky

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 129

WILLIAM BENTVENA and WILLIAM STRUZZIERI,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, ~~AND MOTION FOR STAY OF MANDATE AND CONTINUATION OF BAIL~~

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IN THE

Supreme Court of the United States

October Term, 1966

No.

WILLIAM BENTVENA and WILLIAM STRUZZIERI,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, ~~AND MOTION FOR STAY OF MANDATE AND CONTINUATION OF BAIL~~

Statement

Petitioners, William Bentvena and William Struzzieri, each pray that this Court grant a rehearing of its order of October 10, 1966, denying their joint Petition for writ of certiorari and that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case as prayed for in the Petition for Writ of Certiorari herein. ~~The Petitioners also pray for a stay of mandate and continuation of bail.~~

The Petitioners herein, together with one Samuel Monastersky, were convicted of violations of 21 U.S.C. 173, 174. The Petitioner Bentvena's involvement is confined to a

violation which allegedly occurred on January 13, 1959 whereas Petitioner Struzzieri and the third defendant were allegedly involved in violations which occurred on January 6, 1959 and January 13, 1959.

On appeal to the Court of Appeals for the Second Circuit, both Petitioners urged that the judgments of conviction against them should be reversed because there was insufficient evidence of their guilt as a matter of law to warrant the submission of the case to the jury and that the indictments should have been dismissed by the Trial Court. The Circuit Court appeared at times to recognize such contention and at other times to confuse such contention with a motion to set aside a jury verdict of guilty as contrary to law and against the weight of evidence. In the latter instance, the Court presupposed that there was sufficient evidence of Petitioners' guilt for submission to the jury; whereas the thrust of the Petitioners' contention was that there was insufficient evidence of their guilt to be submitted to the jury. This was the issue raised by the Petition for Writ of Certiorari.

Reasons for Granting Rehearing and Issuing the Writ

The grounds for this Petition for rehearing are as follows:

On appeal to the Court of Appeals for the Second Circuit, the third defendant, Monastersky, contended that the built-in presumption of knowledge of illegal importation of narcotics arising from the possession thereof as provided in 21 U.S.C. 174 was inapplicable because the Government had failed to prove possession. His contention was rejected by the Court of Appeals. The Petitioners did not

raise such issue in the Court of Appeals. However, upon reflection, the Petitioners respectfully urge such contention as the grounds in support of this Petition.

The record does not show that the heroin allegedly sold to the agent was illegally imported or that either of the Petitioners knew from where it came. Hence, the conviction of the Petitioners can only stand if the Government proved they had "possession" of the heroin. Absent such proof of possession, the presumption created by Section 174 does not apply.

The Petitioners contend that the evidence fails to establish that either of them had actual possession or the power to control the disposition of the heroin. At best, they merely happened to be in the vicinity at the wrong time.

As to the alleged transaction of January 6, 1959, there is no proof of possession of narcotics by Petitioner Struzzieri. The testimony merely shows that Struzzieri had allegedly entered an apartment house at 525 East 88th Street, New York City carrying a blue wrapped package and left shortly thereafter without the package. However, there is no proof of what apartment he entered, who he met, what he did with the package, what was in the package, what happened to the package or whether it remained in the same condition. The testimony continues in this vein; that someone named McGovern left the building carrying a package, but this package is not described, that McGovern went to an apartment in another apartment building at 448 East 87th Street, New York City and that in such apartment he exhibited to agent Giorgio a package purportedly containing heroin, and left that apartment and delivered a brown wrapped package to agent Giorgio. There is a

complete lack of proof that Petitioner Struzzieri ever met McGovern or had been in the same apartment with him, or could have passed a package to him, or that the package allegedly carried by Struzzieri ever left the first building, or that the blue wrapped package which agent Giorgio saw Struzzieri carry into the first building was the same brown wrapped package which agent Mangioracina saw carried out of the second building, or whether they were the same package or different packages, or whether agent Giorgio ever received a package from McGovern in the second building, or that if it was the same package, that it was in the same condition and had the same contents, or that Struzzieri ever entered the second building.

The attention of this Court is respectfully invited to the conflicting testimony of the agents as to the alleged events of January 6th, 1959. Agent Giorgio testified that Struzzieri entered building 525 carrying a blue wrapped package and that later he purchased and obtained possession of a blue wrapped package from building 448.

Agent Mangiaracina's testimony is exactly contradictory and different, and repudiates agent Giorgio's story. He states that the package which Giorgio obtained from 448 was brown wrapped.

This testimony completely repudiates the prosecutor's claim of possession, because in effect agent Mangiaracina states that the package purportedly containing narcotics which Giorgio allegedly purchased was not the same package which Struzzieri had allegedly carried into a different building.

Hence inasmuch as there was no proof of possession by Struzzieri as a matter of law, the evidentiary inference of

unlawful importation and knowledge thereof should not have been permitted.

As to the events of January 13, there is likewise no proof of possession by either Struzzieri or Bentvena. The testimony discloses merely that Struzzieri allegedly removed a brown package from a car trunk and entered the apartment building at 525 East 88th Street, New York City and went upstairs. However, there is no proof as to which apartment, if any, they entered or approached, or that they ever had contact with McGovern, or that they entered or approached Apt. 2H. The testimony further alleges that McGovern was in Apt. 2H with agent Giorgio and that his doorbell rang and McGovern answered it and returned with a brown package purportedly containing heroin which Giorgio purchased.

Here again the evidentiary inference was inapplicable, because of the total absence of proof of possession as a matter of law.

Neither petitioner had possession as a matter of law; hence the Court should not have permitted the applicability of the evidentiary inference arising from "possession", that there was an illegal importation and that the petitioners had knowledge thereof.

Stay of the Mandate

The Petitioners are presently at liberty and it is respectfully requested that the mandate be stayed and that bail be continued pending the determination of this Petition. The Petitioner Bentvena is presently free on bail of $10,000.00 and Petitioner Struzzieri is presently free on bail of $15,000.00.

The Petitioner William Bentvena is 33 years of age, has been married about eight years, and is the father of two children. He resides with his wife and children at 21 Granada Avenue, Roosevelt, L.I. He has one prior conviction, in a State Court, for the misdemeanor of possession of marijuana, in which imposition of sentence was suspended (1957).

The Petitioner William Struzzieri has two prior State convictions, for bookmaking, about 20 years ago, which involved no imprisonment. He is 37 years old, he has been married (now divorced), and he resides with his mother, his sister and his sister's husband at 127 W. 16th Street, Richmond Hill, Queens.

Neither Bentvena nor Struzzieri can be considered bail risks. They have been under indictment in this case since 1960, they have gone through a long ordeal of successive trials and appeals, and they have invariably honored their obligations of appearing in Court whenever their presence has been required. These men are not hardened criminals, and they should be given their fair and normal opportunity to pursue the certiorari avenue of review.

It does not appear that the Government would be prejudiced by the granting of this motion for stay of mandate and continuation of bail pending certiorari. This Court has already determined that Bentvena and Struzzieri were not proved to have been members of the narcotics conspiracy charged in the same indictment herein, in *United States* v. *Bentvena,* 319 F. 2d 916 (C. A. 2 1963), cert. denied 375 U.S. 940. Their convictions in the instant trial were on substantive charges not importing those graver conspiratorial involvements. The comparatively moderate bail

under which they are presently free suggests that the Court below, which was in a position to evaluate the situation, did not regard Bentvena and Struzzieri as "dangerous", from the standpoint of bail risk.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit and that the issuance of the mandate be stayed and bail continued.

Respectfully submitted,

IRWIN KLEIN
Attorney for Petitioners
William Bentvena and
William Struzzieri

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

IRWIN KLEIN
Attorney for Petitioners
William Bentvena and
William Struzzieri